National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: July 18, 1995

TO: John D. Nelson, Regional Director, Region 19

FROM: Barry J. Kearney, Acting Associate General Counsel, Division of Advice

SUBJECT: St. James Hospital, Cases 19-CA-23897, 23921

530-6067-6001-3750, 530-6067-6067-3400, 530-6067-6067-8150

These Section 8(a)(5) cases, involving the Employer's failure to furnish the Union with the identities and medical records of patients, were submitted for advice as to the adequacy of the Employer's asserted confidentiality privilege in a grievance/arbitration setting.

FACTS

(1) The Employer refused to comply with the Union's request based on the patient's express refusal to agree to the release of the information, hospital policy supportive of patient privacy, and Montana state law/policy.

On April 11, the Union asked the arbitrator to order the Employer to release the specified patient information. The arbitrator denied the request. The hearing concluded and a decision is expected in July. However, both parties apparently agree that the arbitrator has the authority to re-open the hearing. In this regard, the Employer, without opposition by the Union, unsuccessfully requested that the arbitrator re-open the hearing in order to respond to new assertions made by the Union in closing briefs.

Respiratory therapist Bukovatz was discharged for failing to administer proscribed treatment to a patient, failing to report the lack of treatment to the patient's physician, and for failing to create a written report of the incident. On March 16, arbitration of this discharge commenced with the presentation of the Employer's case.(2)

During the March 16 hearing, the Employer presented the Union with medical records for the affected patient. However, the documents were redacted and devoid of any information which could identify the patient. Once again, the Employer refused to release the identity of the patient. The Employer takes the position that this information was irrelevant since the complaint was lodged by the patient's physician and not by the patient. Additionally, the Employer contends that liability may result from the patient learning about the incident as a result of the Union's information request.

Section 50-16-525 of Montana's Uniform Health Care Information Act prohibits health care providers from disclosing patient information, including information which might identify the patient, without the patient's consent. However, the statute permits the release of information without patient authorization in certain specific situations or, generally, "as otherwise specifically provided by law ...." Additionally, hospital policy provides that patients have a right to "expect that care, including source of payment for treatment, will be kept confidential except as otherwise provided by law or third party payment contract."

ACTION

We conclude that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by refusing to furnish the Union with the requested patient identities and medical information.(3)

In Howard University,(4) where a hospital unlawfully refused to furnish patient medical records, the Board set forth the following legal principles:

[A]n employer has an obligation to provide a union with information relevant to its duty as a representative of the employees. Washington Gas Light Co., 273 NLRB 116 (1984). This obligation extends to information required by the union to process a grievance. NLRB v. Acme Industrial Co., 385 U.S. 432 (1967); Designcraft Jewel Industries, 254 NLRB 791 (1981). The standard for the relevancy of the information sought by the Union is set forth in W-L Moulding Co., 272 NLRB 1239 (1984), in which the Board [citation omitted] stated, "The Board's only function in such situation is in 'acting upon the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'"

The Board further stated:

Relevancy, however is not the sole factor in deciding whether the information must be produced by the [employer]. Although the requested information may be relevant, an employer may not be required to produce it if such production violates confidentiality and privilege. The [employer's] claim of confidentiality must be balanced against the union's need for relevant information in pursuit of its role as a representative of the employees. Detroit Edison v. NLRB, 440 U.S. 301 (1979). . . . The party asserting confidentiality has the burden of proof. McDonnell Douglas Corp., 224 NLRB 881 (1976).[5]

In the present cases, the identities and medical records of the patients are relevant since they clearly "would be of use to" the Union in evaluating and/or defending against the alleged misconduct. As to Rotundi, the patient's testimony may have been dispositive as to alleged rudeness and being left unattended, while medical records may have shown that the patient did not require further assistance in leaving the bathroom. As to Bukovatz, the patient's identity and testimony, as well as medical records, may demonstrate that the patient refused treatment, and thereby negate and/or mitigate the alleged misconduct of failing to give treatment.

Moreover, since the Employer has failed to carry its burden of establishing a "legitimate and substantial" confidentiality interest for not furnishing the requested information, it is inappropriate to accommodate its confidentiality claim with the Union's need for relevant information under Detroit Edison. In this regard, the Employer's own policies on disclosure, "aside from being self-imposed, recognize that in some circumstances medical records and information are disclosable." Howard University, 290 NLRB at 1007. Similarly, Montana state law specifically exempts from the general prohibition against disclosing a patient's identity and other medical records unauthorized disclosure "as otherwise specifically provided by law." As discussed in Howard University, this requirement is satisfied by Section 8(a)(5) of the National Labor Relations Act.

Accordingly, the Employer unlawfully refused, and should be ordered, to furnish the Union with all requested information.[6]

B.J.K.

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[1] Although Rotundi and the Union already know the identity of the complaining patient, they assert a risk of liability under the Montana statute regarding patients' right of privacy, discussed below, if they contact the patient on their own.

[2] The Union will present its case in August.

[3] The fact that the Employer furnished the Union with a redacted copy of the patient's medical records at the opening of the Bukovatz arbitration is irrelevant since they do not reveal the patient's identity and, in any event, "belated compliance does not exonerate." Fairmont Hotel, 304 NLRB 746, 748 fn. 11 (1991), enfd. 996 F.2d 1553 (3d Cir. 1993) (citation omitted).

[4] 290 NLRB 1006, 1007 (1988). See also Transport of New Jersey, 233 NLRB 694 (1977) (employer's failure to supply union with requested names and addresses of passenger-witnesses to bus accident unlawful, where employer had determined that driver was at fault).

[5] 290 NLRB at 1007.

[6] The affirmative disclosure of the information regarding Rotundi is necessary in the event that the Union requests re-opening of the arbitration, which the parties apparently agree is permissible under the collective bargaining agreement. Cf. Westinghouse Electric Corp., 304 NLRB 703, 709 (1991) (only remedy was cease and desist order where arbitrator's authority to re-open record was unknown).